

VOLUME II  
PAGES 160-339  
EXHIBITS 171-184

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

C.A. No. 04-11193NG

\*\*\*\*\*

SHAWN DRUMGOLD,  
Plaintiff

vs.

TIMOTHY CALLAHAN,  
FRANCIS M. ROACHE,  
PAUL MURPHY, RICHARD WALSH,  
AND THE CITY OF BOSTON,  
Defendants

\*\*\*\*\*

CONTINUED DEPOSITION OF STEVEN

RAPPAPORT, a witness called by counsel for the Defendant, Richard Walsh, taken pursuant to the applicable provisions of the Federal Rules of Civil Procedure, before Joann Denning, a Shorthand Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the offices of Bonner Kiernan Trebach & Crociata, One Liberty Square, Boston, Massachusetts, on Saturday, February 3, 2007, commencing at 10:17 a.m.

COPY

I N D E X

<u>Witness</u>	<u>Continued Direct</u>	<u>Cross</u>
STEVEN RAPPAPORT		
(By Mr. Curran)	164	--
(By Mr. Roache)	--	302
(By Mr. White)	--	328

E X H I B I T S

<u>No.</u>		<u>Page</u>
171	Excerpt of Transcript from Trial Day 8	165
172	Excerpt of Transcript from Trial Day 7	168
173	Excerpt of Transcript from Trial Day 9	168
174	Excerpt of Transcript from Trial Day 7	190
175	September 26, 1989, Pretrial Motions	200
176	Interview of Eric Johnson	201
177	Notice of Alibi	210
178	Excerpt of Transcript from Trial Day 9	211
179	Side Bar Conference	221
180	Trial Testimony of Travis Johnson	223

1 attorney, if you had any information that a  
2 witness' faculties were impacted in some  
3 degree what steps would you do to investigate  
4 that or to inquire before a witness would be  
5 placed on the stand?

6 A. The rules today under Lampron are pretty simple  
7 in a sense. I forget what the rules were in  
8 '88, '89. I was at that point in certain  
9 situations, as I do today, hiring experts who  
10 could provide testimony with regard to a person  
11 having a certain condition, their ability to  
12 perceive, remember, and explain what it is that  
13 they perceived and remembered, what the effects  
14 of their condition would be.

15 I imagine if I had known about Mary  
16 Alexander's situation I would have attempted to  
17 get her medical records in order to be able to  
18 provide to an expert to assist me and perhaps  
19 even use those medical records affirmatively if  
20 one doesn't see something in records that one  
21 would expect to see. Maybe she had discussed  
22 the shooting. Maybe she had discussed the  
23 shooting and not mentioned being able to  
24 identify anybody.

1           If I had known of Mary Alexander's  
2           diminishing mental faculties, I would have  
3           conducted an examination into what her  
4           abilities were to see and remember.

5   Q.       If you knew she was dying, you would have done  
6           further investigation?

7   A.       If I knew that she had a condition that  
8           impacted her brain, I would have done more. I  
9           didn't know.

10   Q.       Clearly if someone has brain cancer the  
11           inevitable is that they're dying?

12           MR. REILLY: Objection.

13   A.       Once again, if I would have known that there  
14           was any brain illness I would have scoured  
15           every record with regard to her with the  
16           assistance of an expert.

17   Q.       The question I had is if a witness -- if you  
18           had information that a witness was dying, as a  
19           seasoned criminal defense attorney would you  
20           inquire in regards to why she was dying, why he  
21           or she was dying, and the cause?

22   A.       I don't know. Sometimes that's a good thing as  
23           a seasoned criminal defense attorney.

24   Q.       It's a good thing where if a key witness is --

1 A. I had a case last week where a key witness went  
2 before a grand jury, was going to testify  
3 against my client, and then died of cancer.  
4 The case went bye-bye.

5 Q. What I'm saying is if you have a witness that  
6 you have information that they're dying, that  
7 clearly if they're going to be called as a  
8 witness at trial as a seasoned criminal defense  
9 attorney you would want to further investigate  
10 the cause for the health concerns?

11 A. Not necessarily.

12 Q. Why?

13 A. In the last case I knew the witness was dying.  
14 The DA didn't. I file a motion seeking  
15 records, now the DA knows the witness is dying.  
16 Perhaps the DA has a Rule 35 deposition to  
17 preserve testimony, and I don't win my case.  
18 So why would I tip the DA off to the fact that  
19 I know the witness has incurable brain cancer  
20 and is dying, when the DA doesn't do his or her  
21 job in the first place and stay up with their  
22 witness?

23 Q. The case you just had where the witness died of  
24 cancer before they got to the grand jury --

1 A. No. They went to the grand jury, but I didn't  
2 go to the grand jury so they couldn't use the  
3 grand jury, before trial.

4 Q. Before trial you had knowledge that that  
5 witness had cancer?

6 A. Correct.

7 Q. Clearly then one of the strategies is not to  
8 disclose to the Commonwealth this ailment; you  
9 have no obligation to?

10 A. I have no obligation.

11 Q. As a result the witness died before testifying  
12 and being subject to cross-examination;  
13 therefore, the testimony was not admissible?

14 A. Correct.

15 Q. So clearly you didn't have an obligation, and  
16 clearly there was a strategy involved regarding  
17 that decision you made?

18 A. Clearly.

19 Q. In that particular case, if the witness did  
20 survive up until the trial and was called as a  
21 witness you were prepared to take steps to  
22 protect your client to make sure that -- I  
23 wrote down what you said before -- to test or  
24 challenge the witness' ability to perceive,

1 ability to remember, and ability to describe,  
2 you would have taken those steps?

3 A. Not in this case. I didn't need to.

4 Q. Because he died?

5 A. No. There was no identification issue because  
6 my client and the individual were known to each  
7 other. I might have taken advantage of the  
8 fact that the person was debilitated and would  
9 have looked like a very poor witness for the  
10 government without any explanation because of  
11 the person's diminishing mental faculties.  
12 Different situations call for different methods  
13 of operation.

14 Q. So clearly then that's another strategy  
15 decision that you make relative to --

16 A. In that case I know that's the strategy  
17 decision I would have made rather than seeking  
18 to --

19 Q. Discredit the witness?

20 A. No, I don't think it necessarily would have  
21 discredited the witness. The indication could  
22 have been that at the time of the grand jury  
23 the witness was not suffering from as bad a  
24 problem at time of trial. I don't want to give

1 the jury a reason to understand why the  
2 witness' testimony has changed drastically if  
3 it would. I was going to just cross-examine in  
4 this case.

5 In a murder case very often we go about  
6 things differently. We do touch all the bases.  
7 We do out of an abundance of caution sometimes  
8 things that we wouldn't do in an assault and  
9 battery case or a small drug case or just --  
10 you know, it's a question of how much time do  
11 you have, how many resources do you have.

12 When I try a murder case, generally  
13 speaking I have unlimited resources for  
14 experts, for testing, kind of like when you  
15 guys represent insurance companies, you know.  
16 Sometimes you have deep pockets, and certainly  
17 when I'm doing a -- the only advantage to doing  
18 an assigned case for the committee in a murder  
19 situation is that at least I know I'm going to  
20 have the resources to try the case properly. I  
21 may not get paid what I'm supposed to get paid,  
22 but my client isn't going to be shortchanged  
23 when it comes to expert services.

24 So, as I say, in a murder case where I



1 know I have unlimited resources to do that  
2 which I need to do for the client, I'm more  
3 likely to do it than in a case where my client  
4 either doesn't have money and I have to go  
5 before a judge and try to convince a judge that  
6 I have a need for money above what my client  
7 can pay when I'm not assigned to the case, and  
8 the next thing I know the DA gets hold of my  
9 pleadings, so many different things that can  
10 happen. In this case had I known Mary  
11 Alexander was ill I would have no doubt hired  
12 an expert to assist me.

13 Q. You indicated that in murder cases the issue of  
14 a dying witness would be handled differently.  
15 Would your strategy be any different?

16 A. I don't know.

17 Q. Would you have some level of concern of  
18 cross-examining a witness that may not have had  
19 the ailment at the grand jury but now at trial  
20 is suffering the ailment --

21 A. Yeah, I --

22 Q. Let me finish the question. Would you weigh  
23 the fact if you cross-examine on a particular  
24 issue like someone dying of cancer that it may

1           elicit sympathy from the jury and have an  
2           adverse impact?

3       A.     Not in a situation like this. I didn't think  
4           Mary Alexander was on anybody's side. Mary  
5           Alexander was a witness, as opposed to Rickey  
6           Evans. There are people who in this world are  
7           witnesses. They don't have any stake in the  
8           action. I think Mary Alexander was that kind  
9           of person.

10                   In 1988 Mary Alexander was not an  
11           individual who would have inculcated Shawn  
12           Drumgold. In fact, she failed to pick his  
13           photo out of an array as I recall in 1988. By  
14           1989 when she was ill she suddenly became very  
15           inculpatory in the case. I would have wanted  
16           the jury to know that she was healthy or  
17           healthier in '88 when she could not identify  
18           the client than she was in '89 when she did.  
19           Just that in and of itself is something that  
20           I'd want the jury to know. I don't think I'm  
21           going after the witness by dealing with an  
22           objective fact of her illness and that her  
23           illness may have impacted her memory.

24       Q.     If you knew --

1 A. And I think it did frankly.

2 Q. If you knew she was ill and dying, what would  
3 you have done?

4 A. Well, I would have hired a neurologist, and I  
5 would have looked for an expert who could have  
6 told me whether or not the particular problems  
7 she had would have impacted her memory. And I  
8 certainly would have done that -- I think that  
9 I might have dealt with the in-trial  
10 investigation differently if I knew she was  
11 ill.

12 Q. How would you have dealt with the in-trial  
13 investigation?

14 A. I probably wouldn't have spoken to her.

15 Q. Excuse me?

16 A. I probably would not have spoken to her under  
17 the circumstances that I did. That is, when I  
18 went to speak to Tracie Peaks and she said,  
19 Would you like to meet Mary Alexander, if I  
20 would have known that Mary Alexander was as ill  
21 as they say she was I probably would have  
22 handled it differently. I don't know how I  
23 would have done it, but I would have done it  
24 differently.

1 Q. Prior to going out with Mrs. Drumgold you made  
2 a decision to show Mary Alexander the  
3 photograph of Shawn Drumgold?

4 A. I don't think that's so. I made a decision  
5 after speaking to Tracie Peaks to show Mary  
6 Alexander the photograph. I think I went to  
7 speak to Tracie Peaks to that house. I don't  
8 think I went to speak to Mary Alexander. I  
9 think it was Tracie Peaks who said to me at  
10 some point, Would you like to speak to Mary  
11 Alexander? She's right upstairs. At that  
12 point I said -- well, I don't remember exactly  
13 what I said, but basically, Would you introduce  
14 me to her? Sure, no problem. I'll go talk to  
15 her.

16 Q. Prior to going to 72 Homestead Street you knew  
17 that Tracie Peaks and Mary Alexander lived in  
18 the same house?

19 A. I did, but I don't think that Mary Alexander  
20 was really viewed as anything other than a  
21 positive in the case at that particular time  
22 because all I knew about Mary Alexander was she  
23 was shown a photo array. Shawn Drumgold's  
24 picture was in the photo array, and she

1           couldn't select Shawn Drumgold's photo from the  
2           array.

3   Q.       Prior to speaking to her did you make a  
4           tactical decision to show her the photograph?

5   A.       I did.

6   Q.       At which point in time -- why don't you  
7           describe the circumstances of how that  
8           occurred.

9   A.       I don't remember other than the fact that I had  
10           a single photo of Shawn Drumgold taken at  
11           around the time of -- I don't know if it was a  
12           booking photo from his arrest on the Tiffany  
13           Moore case or a booking photo from an arrest  
14           prior thereto, but in the photo Shawn Drumgold  
15           was this skinny kid.

16               By the time of trial, almost 13 months  
17           after he was arrested, he put on a lot of  
18           weight, went from being what I thought was  
19           really sort of a skinny kid to being what I  
20           would call a fireplug. He did nothing but  
21           calisthenics in his cell for about a year, and  
22           he just built himself up into this very  
23           powerful-looking young man and then, of course,  
24           shaved his head which made him look a little

1 bit more scary I'd say, or at least  
2 distinctive.

3 A stupid defense lawyer thought it would  
4 be a good idea for his client to go out on the  
5 view, and Mary Alexander indicated to me that  
6 she identified him on the view. He looked  
7 nothing on the view like he looked 13 months  
8 earlier. I should have picked up on that.

9 I also should have picked up on the fact  
10 when she did identify him finally in the  
11 courtroom and identified him as sitting next to  
12 that police officer, meaning me, when she had  
13 met me a short time earlier and knew I wasn't a  
14 police officer. I should have picked up on  
15 that, also.

16 Q. How were you dressed when you went to  
17 72 Homestead Street to speak to Tracie Peaks  
18 and subsequently Mary Alexander?

19 A. Could have been in a suit. Wasn't in uniform,  
20 that's for sure.

21 Q. You were in a suit?

22 A. Could have been. As you can see, I don't  
23 always wear a suit.

24 Q. Do you have any memory that at any time police

1 officers in a uniform interviewed Tracie Peaks  
2 or Mary Alexander based on the discovery in  
3 this case?

4 A. I know that Mary Alexander was interviewed  
5 early in the case because she was shown a photo  
6 array and couldn't pick out Shawn Drumgold. I  
7 don't know that she was -- I to this day don't  
8 know if she was spoken to from then, the  
9 initial investigation, until the time of trial.  
10 In fact, I have reason to suspect that she was  
11 not spoken to during the trial because  
12 Beauchesne didn't know about my faux pas in  
13 interviewing her. Tracie Peaks, as far as I  
14 knew she was -- I didn't know whether or not  
15 anybody spoke to her after she went to the  
16 grand jury.

17 Q. During the course of trial, you took steps to  
18 clearly make it appear to the jury that  
19 Shawn Drumgold wasn't in custody, correct?

20 A. Well, Judge Alberti was very kind, and he  
21 allowed Shawn to go on the bus not in  
22 handcuffs, not in ankle chains. As long as he  
23 stood between me and one of the court officers,  
24 he was permitted to leave the bus to walk

1           around the view with the rest of us, and that  
2           was one effort made. We sequestered the jury,  
3           and that was another effort made to keep the  
4           jury from knowing that Mr. Drumgold was in  
5           custody.

6           I just -- the problem, of course, although  
7           this was probably just a voir dire, I mean,  
8           when Chaney or Reese -- I forget which one was  
9           actually examined on voir dire -- mentioned  
10          that, well, you know, we never had a problem  
11          with Shawn before the incident and we've been  
12          in Charles Street with him since the incident  
13          and we don't have a problem with him, but that  
14          may have only come out on voir dire.

15          So as in any case, you try to keep it from  
16          the jury that the guy's in custody, but I don't  
17          know if the jurors are stupid. I think they're  
18          pretty smart, smarter than we give them credit  
19          for.

20   Q.     In your examination of Shawn Drumgold, did you  
21           want to make it clear that there's been a  
22           physical change of his appearance from a skinny  
23           kid to the person who's put on 40 pounds?

24   A.     I probably did.



1 Q. You acknowledge that during the course of your  
2 examination you, in fact, elicited from Shawn  
3 Drumgold the fact that he was doing a thousand  
4 push-ups a day in his jail cell at the Charles  
5 Street jail?

6 A. If I said it, I said it.

7 Q. Was that a strategic tactical decision that you  
8 elicited that information from Shawn Drumgold?

9 A. It may have been not so much strategic as much  
10 as an acceptance that the jury knew that he was  
11 not on the street.

12 Q. Like in any murder case?

13 A. No. I've had murder cases where I've managed  
14 to get my clients on the street. You better  
15 believe that the client's sitting in the  
16 courthouse at 8:15 as the jurors may start to  
17 come in.

18 Q. So the image is portrayed that he's not in  
19 custody?

20 A. If I can do it, I do it. It's not the image  
21 portrayed to let the jury know that the guy's  
22 on the street. How dangerous could he be if  
23 he's on the street?

24 Q. Do you have any memory today of what your

1 tactical decision was to elicit that testimony  
2 from Shawn Drumgold?

3 A. No, other than to show that he had changed his  
4 appearance.

5 Q. Do you have a memory in regards to when you  
6 showed the photograph of Shawn Drumgold to Mary  
7 Alexander?

8 A. It was during trial.

9 Q. Do you have any memory of whether it was before  
10 the voir dire or after?

11 A. I don't remember.

12 MR. ROACHE: You mean before the jury  
13 view?

14 Q. The jury view.

15 A. After.

16 Q. That's your memory as you sit here today?

17 A. It's my memory that Mary Alexander indicated to  
18 me that she recognized him from the jury view.

19 Q. You did not take steps to disclose the  
20 identification of Shawn Drumgold by Mary  
21 Alexander to the Commonwealth?

22 A. No, I did not.

23 Q. In your mind you didn't have any obligation to  
24 provide that information to the Commonwealth?

1 A. I don't think I have any obligation.

2 Q. As you sit here today, you take the same  
3 position, that you don't have any obligation to  
4 turn that over to the Commonwealth?

5 A. That's my position. I could be wrong today.  
6 There's been some recent case law that seems to  
7 indicate I've got to do some work for the  
8 government every now and then, but I'd rather  
9 not.

10 Q. You'd take the same position today --

11 A. I would take the same position today.

12 Q. Did you have any contact with Mary Alexander's  
13 mother at any time?

14 A. I don't remember having any contact with her.

15 Q. Do you recall the age of Mary Alexander when  
16 you --

17 A. I think she appeared older than she was. For  
18 some reason my memory is she was in her 20's.  
19 She might have looked like she was in her early  
20 30's. I don't really remember. I don't  
21 remember.

22 Q. How do you remember the identification by Mary  
23 Alexander of Shawn Drumgold being elicited,  
24 being discovered by the Commonwealth?

1 A. It was during her testimony. She was on the  
2 stand.

3 Q. During or prior to?

4 A. I don't think the Commonwealth found out about  
5 it until -- maybe Beauchesne found out about it  
6 when he brought her in that day, but I don't  
7 think the Commonwealth knew about it prior to  
8 the date that she testified. Perhaps they  
9 interviewed her prior to her testimony and  
10 found out about it, but if that happened it  
11 happened the day of her testimony.

12 (There was a discussion off the record.)

13 MR. CURRAN: I'm just going to have marked  
14 a lobby conference, Pages 101 to 106, where  
15 Mr. Beauchesne discloses to the Court the  
16 identification by Mary Alexander of Shawn  
17 Drumgold. I ask that be marked and that be  
18 provided to the witness for review. It was  
19 actually right after Vantrell McPherson  
20 completed her testimony and before Travis  
21 Johnson testified, I believe.

22 (Exhibit No. 183, Transcript of Lobby  
23 Conference, marked for Identification.)

24 (A brief recess was taken.)

1 Q. Have you had a chance to review the transcript  
2 of the lobby conference, Exhibit No. 183?

3 A. I have.

4 Q. Does that refresh your memory that, in fact,  
5 the government, the Commonwealth, and the  
6 former district attorney's office knew about  
7 Mary Alexander's identification of Shawn  
8 Drumgold prior to her being called as a  
9 witness?

10 A. I think I had said initially that it might have  
11 been the same day when they brought her in to  
12 prep her for her testimony that they found out.  
13 It seems to be what happened.

14 Q. And that was she was being prepped by Assistant  
15 District Attorney Phyllis Broker at the time?

16 A. The Honorable.

17 Q. Did she have an active role in this case that  
18 you're aware of?

19 A. Until I read this, I didn't know that Phyllis  
20 was involved in the case.

21 Q. There is a pleading in regards to supplemental  
22 witness list with a tag name of Phyllis Broker.  
23 Does that --

24 A. I've known Phyllis ever since she was a DA in

1 Middlesex County. We had our first case  
2 against each other in 1980 or '81, and I did  
3 not recall that she was in any way involved in  
4 this case.

5 Q. Did you see her around the courtroom during the  
6 course of the trial before she came in on the  
7 lobby conference?

8 A. If Phyllis was in the Suffolk County DA's  
9 office at the time, I used to see her around  
10 all the time. She was involved in the homicide  
11 unit at one point. But, frankly, I had no  
12 memory until five minutes ago that Phyllis had  
13 anything to do with this case.

14 Q. It's clear based on the transcript that she was  
15 preparing witnesses for Phil?

16 A. I'm not denying she was involved. I'm just  
17 saying I didn't remember.

18 Q. Is it fair to say, does this refresh your  
19 memory that Mary Alexander had indicated to the  
20 government that the photo identification  
21 procedure that you directed with her occurred  
22 before the view took place?

23 A. No. My memory is that the view had occurred  
24 first. I could be wrong, but that's my memory.

1 Q. Clearly the record would dictate what occurred  
2 back in 1989 at the trial?

3 A. I don't think I could answer that question.

4 Q. Getting back to the aspect of if you had  
5 knowledge that a witness was dying, would you  
6 inquire and investigate, before you made a  
7 strategic decision how to handle it, the reason  
8 why the witness was dying; is that a fair  
9 statement?

10 A. I think early on I'd want to know, yeah, why  
11 she was dying.

12 Q. That would play a role into how you handled it  
13 strategically?

14 A. Well, I would have to consult with an expert,  
15 and I think I would have to take my strategy  
16 from there depending upon what an expert would  
17 say to me.

18 Q. If you didn't have the luxury of getting an  
19 expert, would you take steps in the form of a  
20 voir dire of a witness to determine whether or  
21 not there's any impact on their ability to  
22 remember, perceive, or describe?

23 MR. REILLY: Objection.

24 A. The test for competency to testify, the bar is

1 so low that I don't know that I would risk good  
2 cross-examination grounds for a foolish, what I  
3 view as sometimes a foolish competency  
4 determination in court.

5 If the government was aware of the  
6 witness' condition and didn't tell me, I would  
7 insist on time to procure an expert and with  
8 the assistance of that expert attempt to make a  
9 determination as to how, if in any way, the  
10 person's condition is affecting their  
11 abilities, their testimonial abilities. That  
12 would be memory, perception, things of that  
13 nature.

14 If the government was unaware of it and we  
15 all discovered it at that point, I would hope  
16 that the judge would exercise discretion to  
17 allow both the government and the defendant to  
18 hire experts to make a determination as to how  
19 this impacts the witness' competency. I would  
20 think the government would have an equal if not  
21 greater interest in determining that the  
22 evidence they place before a jury was  
23 competent.

24 I can't imagine not seeking the assistance



1 of an expert to determine what the effect of  
2 the witness' condition would be on her  
3 competency as a witness, her memory, her  
4 perception, things of that nature.

5 Q. The question I have now is not what the  
6 Commonwealth would do or the Court. If you had  
7 knowledge that a witness was dying that was  
8 being called or has been called at trial as a  
9 witness, what would you do as a criminal --

10 A. Is the witness an exculpatory witness or  
11 inculpatory witness? So much depends upon what  
12 the witness' role in the case is. If the  
13 witness was potentially inculpatory, I would  
14 seek funds to have an expert assist me in  
15 determining whether or not there's a fertile  
16 area of cross-examination.

17 Q. If the witness was exculpatory, not  
18 inculpatory, what would you do?

19 A. Does the government know about it?

20 Q. Assume no.

21 A. It would depend upon the circumstances of the  
22 case.

23 Q. If you became aware prior to a witness -- if  
24 you became aware in the course of a trial that

1 the witness was dying, what would you do as a  
2 criminal defense attorney?

3 MR. REILLY: Objection.

4 Q. Again, using inculpatory versus exculpatory.

5 A. I would try to secure the relevant medical  
6 records. I would ask for the assistance of an  
7 expert, at least make a preliminary  
8 determination as to whether or not there might  
9 be something there, and if there was something  
10 there at that point I might ask for a voir dire  
11 of the witness. But I think lacking the  
12 expertise to read medical records and know  
13 specifically what a particular condition and  
14 its effects would be on a potential witness I  
15 would want the services of an expert.

16 And, frankly, in the last close to 25  
17 years of trying murder cases on an assigned  
18 basis it's amazing the amount of money the  
19 Commonwealth has given me to do this. I've  
20 never been denied funds. I've actually never  
21 been denied funds by a judge in a murder case.

22 Q. If you were in the middle of a trial and a  
23 witness is on the stand and if you didn't have  
24 time --

1 A. Sometimes you got to move quickly. There are a  
2 number of expert lists that are available to  
3 anybody that does work for CPCS in the murder  
4 list. There are experts who will make  
5 themselves available in a reasonably short  
6 period of time. And even during the course of  
7 a trial we sometimes have to do these things  
8 and decisions that we make and moves we have to  
9 make during trial. There's not a lot of sleep  
10 that goes on during a trial.

11 Q. Did you consult with any experts in preparation  
12 for your defense of Shawn Drumgold?

13 A. Not that I remember.

14 Q. Did you consult with any identification  
15 experts?

16 A. No.

17 Q. Did you consult with any medical experts?

18 A. Not that I remember. I may have spoken to --  
19 I'm sure I spoke to the ME at some point, and  
20 very often in murder cases what I'll do is I'll  
21 consult with an ME on my own, but in this  
22 particular case I have no memory of needing any  
23 experts.

24 Q. Did you interview the ME's that participated in

1 the autopsy of Tiffany Moore?

2 A. I may have. I don't have a specific memory,  
3 but cause of death was never an issue in this  
4 case. Identity was the issue. There are cases  
5 I have where the ME can and often will provide  
6 you with an objective view that can differ from  
7 what alleged percipient witnesses say. I  
8 generally consult with ME's on every case.  
9 Whether I did on this particular case I don't  
10 know because I don't remember there being any  
11 issue in the case as I sit here that the ME  
12 would have provided me assistance with.

13 But it's my general practice to consult  
14 with ME's in cases, and I can think of a case  
15 back in '84 where Dr. Katzis (phonetic) had  
16 said he was shocked at how few defense  
17 attorneys would actually call him up and speak  
18 to him because he was willing to speak to  
19 anybody about anything. I always took that as  
20 an invitation to call the ME. You never know  
21 what you're going to get.

22 Q. You think you followed your --

23 A. I don't remember. I just don't remember.

24 There was one ME, as I recall, working Suffolk

1 County at around this time who did not share  
2 Dr. Katzis' view that he was a mere witness and  
3 not a party to the -- I forget his name. There  
4 was one ME who was very, very difficult to deal  
5 with.

6 Q. Do you recall in this case that there was  
7 actually an ME that conducted the autopsy, an  
8 assistant ME, conducted the autopsy under  
9 Stanley Bogdan and that that ME was now in  
10 Texas and not available at trial and Stanley  
11 Bogdan was called?

12 A. I don't remember that.

13 Q. Did you have a relationship with Stanley  
14 Bogdan?

15 A. No relationship whatsoever.

16 Q. Did you ever consult with him on cases?

17 A. I don't know.

18 Q. Was he that medical examiner who took the  
19 position that he was not a witness for both  
20 sides?

21 A. Oh, no, no. It was Dr. Katzis. No, no, no.  
22 Stanley Bogdan was not the guy I was talking  
23 about that I wouldn't because I would be afraid  
24 that he would go back to the prosecutor and

1 just tell him everything that I asked. I  
2 forget his name. There was one ME in Suffolk  
3 County that used to like to ride around with  
4 the cops.

5 Q. In your experience Stanley Bogdan would talk to  
6 both sides?

7 A. Yes. I told you there was only one ME that I  
8 had a problem with.

9 Q. He'd answer your questions if you had any?

10 A. If I had them.

11 Q. Do you have any memory of a conversation with  
12 Stanley Bogdan?

13 A. No, I don't.

14 Q. Is it your memory today that you took notes  
15 throughout the investigation and the trial?

16 A. I definitely took notes during the trial when I  
17 wasn't questioning. I tend to take copious  
18 trial notes. I'm sure I wrote things down.

19 Q. Did you take notes at any time during the  
20 course of your interview of Shawn Drumgold?

21 A. I'm sure I did, certainly in the initial stages  
22 of our interview, of our relationship.

23 Q. Would there be any times that you would ask a  
24 Court to conduct a voir dire of a witness due

1 to a health concern?

2 A. I think I probably have.

3 Q. Under what circumstances would you then have  
4 the Court conduct a voir dire relative to the  
5 witness' ability to perceive, remember, and  
6 describe?

7 A. For some reason I recall a case -- it was a  
8 Suffolk County case back in the '80s when you  
9 could still file a motion based upon certain  
10 mental health issues that would arise and you  
11 could actually get someone examined for  
12 competency prior to trial. You could get a  
13 complainant in a rape case sometimes examined  
14 depending upon the judge.

15 Q. Is that again a strategy issue, whether you do  
16 it or don't?

17 A. It would be a strategy issue. They don't allow  
18 it anymore. I don't think you --

19 Q. There's got to be a foundation for it?

20 A. It's very difficult to get a complaining  
21 witness examined for competency merely because  
22 they have a mental health history, whereas 30  
23 years ago you could.

24 Q. If a health --

1 A. It's been that long.

2 Q. If a health issue goes to a witness' ability, a  
3 percipient witness' ability to perceive, to  
4 remember, to describe --

5 A. Excuse me. Yesterday was the 30th anniversary  
6 of me starting my practice, my first practice,  
7 out of law school.

8 Q. If a witness' health issue goes directly to a  
9 percipient witness' ability to remember,  
10 ability to describe, or ability to perceive,  
11 would you conduct a voir dire of that witness?

12 A. And the witness is going to be offering  
13 inculpatory testimony against my client?

14 Q. Yes.

15 A. I would try to get such a hearing, most often.  
16 I'd say the general response would be yes.

17 Q. How did you characterize Mary Alexander's  
18 testimony prior to the identification  
19 procedure?

20 A. I don't remember.

21 Q. Prior to the identification procedure Mary  
22 Alexander did not identify Shawn Drumgold in a  
23 photo array, is that correct?

24 A. In the initial stages of the investigation,



1 Mary Alexander had stated that she had seen the  
2 assailants. She was presented with a photo  
3 array. And my understanding is, my memory is,  
4 that she did not pick Shawn Drumgold's photo  
5 out of an array. My memory is also that I saw  
6 the array, and I had no problem picking out  
7 Shawn Drumgold.

8 Q. Based on those facts did you consider Mary  
9 Alexander's testimony to be inculpatory or  
10 exculpatory regarding Shawn Drumgold?

11 A. Without -- but I knew it was coming. The  
12 bottom line is I knew when Mary Alexander  
13 walked into that courtroom she was going to  
14 pick Shawn Drumgold out.

15 Q. I understand that, but I'm saying prior to you  
16 showing the photo --

17 A. I thought she was an exculpatory witness.  
18 There would have been no reason for me to have  
19 her examined at that point.

20 Q. After you showed her the photograph and after  
21 it was disclosed to you that she identified  
22 Shawn Drumgold while there was a view, how did  
23 you consider her testimony, inculpatory or  
24 exculpatory?

1 A. For all I know, it was Tracie Peaks who told me  
2 that Mary Alexander had had an operation.

3 Q. Do you have any notes in regards to where you  
4 obtained this information from?

5 A. No.

6 Q. Did you take any steps to determine where this  
7 operation took place?

8 A. Not that I recall.

9 Q. Did you have an opportunity to -- did you at  
10 any time ever ask anyone from the Commonwealth,  
11 from the DA's office, or the police department  
12 whether or not -- what the operation was for?

13 A. I don't remember whether I asked or not, but  
14 based upon the little knowledge I had I would  
15 not have thought that there was a -- I'm  
16 positive that I didn't make the connection  
17 that it was a brain illness.

18 Q. Did you ever speak to Lola Alexander at any  
19 time prior to the conviction of Shawn  
20 Drumgold?

21 A. Is that the mother?

22 Q. Yes.

23 A. I have no memory of it.

24 Q. Did you speak with Betty Peaks, Tracie Peaks'

1 client said to me that he's HIV positive, I  
2 might not turn that over to somebody.

3 Q. Do you have a storage facility for your old  
4 files?

5 A. No.

6 Q. Where do you keep your old homicide files?

7 A. I either keep files in my office or in the  
8 basement of my home. I would say that the last  
9 five -- most of the last five years' files are  
10 in my office. I have files that have survived  
11 from the '70s, but I had a flood.

12 Q. I learned about the flood.

13 A. I lost, really, truly, I lost a lot of files.

14 Q. Did you lose any homicide files?

15 A. I don't think I lost anything from the Drumgold  
16 case. I don't think I did. There are certain  
17 files that I've maintained over -- I don't know  
18 how many years we're supposed to keep files,  
19 but certain files and generally relating to  
20 homicide cases I have from the '70s frankly.

21 Q. In any homicide file that resulted in a  
22 conviction, you would be reluctant to destroy  
23 those files, would you not?

24 A. I think that any homicide case that I worked